

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BILLY D. FOWLER,

Petitioner,

V.

MAGGIE MILLER-STOUT.

Respondent.

Case No. C07-5356 RJB/KLS

REPORT AND RECOMMENDATION

**NOTED FOR:
June 20, 2008**

Petitioner Billy D. Fowler filed a 28 U.S.C. § 2254 habeas corpus petition related to his November 2004 convictions for the delivery of a controlled possession - methamphetamine, the possession of a controlled substance with intent to deliver -methamphetamine, and money laundering. (Dkt. # 1). Respondent answered (Dkt. # 20) and submitted the relevant record of state court proceedings. (Dkts. # 20 and 35).

Having carefully considered the parties' filings and the record relevant to the grounds raised in the petition, it is recommended that Mr. Fowler's habeas petition be denied and this action be dismissed.

REPORT AND RECOMMENDATION- 1

I. FACTUAL BACKGROUND

A. State Court Procedural History

Mr. Fowler appealed to the Washington Court of Appeals. (Dkt. # 20, Exhs. 3-6). The Washington Court of Appeals affirmed Mr. Fowler's convictions, but reversed the school bus stop sentencing enhancements. *Id.*, Exh. 2.

Mr. Fowler sought review by the Washington Supreme Court. *Id.*, Exhs. 7-9. The Washington Supreme Court denied review on October 31, 2006, and the mandate issued on December 1, 2006. *Id.*, Exhs. 10-11.

B. State Court Factual Background

12 The Washington State Court of Appeals provided the following summary of the facts
13 surrounding Mr. Fowler's crimes:

Billy Duane Fowler and his wife, Pamela Fowler, purchased a home in Vancouver, Washington, in April 2001. The Fowlers made a \$40,000 down payment consisting of \$10,000 cash and four or five checks of varying amounts. Pamela [footnote 3 omitted] testified that they borrowed the money for the down payment from a variety of legitimate sources. The home was within 1,000 feet of two school bus stops in December 2002.

During 2002, and the first half of 2003, the Fowlers owned three businesses. Bright Touch Enterprises began operation in October 2002. The Fowlers' bookkeeper, Kim Amos, worked for Bright Touch Enterprises from October 2002 to April 2003, and testified that the company was not profitable and that she recalled the company losing some money. The Fowlers' second business, B & P Drywall, [footnote 4 omitted] did not enjoy a high volume of business in 2002, but it showed profits on its contract jobs. Finally, Amos testified that the third business, Creative Concrete, had "quite a few jobs" but was not sure whether it was profitable during late spring and summer 2002. 6-B Report of Proceedings (RP) at 643.

Pamela testified that Billy generated the majority of the couple's income during 2001, 2002, and 2003 from gambling. Billy reported income from casinos on Indian reservations on his federal tax returns, but he did not report gambling income from other locations. Pamela testified that Billy likely did not report \$20,000 to \$30,000 on their 2002 federal tax return.

1 Deborah Nichols testified that Billy employed Richard Jordan on and off in
 2 the concrete business and that Jordan obtained drugs from Billy and sold a portion of
 3 those drugs to her. She met Billy between April and October 2002, when Jordan told
 4 Billy that Nichols would pick up two ounces of methamphetamine. Thereafter, Billy
 5 “fronted” her the methamphetamine with the expectation that she would sell the
 6 drugs for him. 5-A RP at 308. For the following six months, Billy regularly fronted
 7 methamphetamine to Nichols for sale, for personal use, and also to play video poker.
 8 [court’s footnote 5. While she did not know how many people were involved,
 9 Nichols testified that she was not the only person selling methamphetamine for Billy
 in 2002. Further, Nichols explained that he had a friend who, as a favor, would
 “enforce” drug debts owed to Billy. Nichols was not sure whether Billy employed
 anyone to act as an “enforcer” or “tax man.” 5-A RP at 316.] Nichols and Billy also
 began a sexual relationship during the first six months of their acquaintance. After
 the six-month period ended, Nichols purchased methamphetamine from Billy for her
 personal use only.

10 Around May 2002, Billy asked Nichols if she knew someone who would
 11 exchange checks for cash. Billy told Nichols that he had cash income from both
 12 gambling and business that he did not want to deposit in the bank because the bank
 13 would be suspicious and he would be taxed. Nichols responded that her father,
 14 Chester Jennings, would be willing and did, in fact, write checks in exchange for
 15 cash on six different occasions in amounts ranging from \$3,000 to \$8,000. Nichols
 16 explained that she believed some of the cash Billy exchanged was from drug sales
 because on one occasion Nichols and Billy stopped at a house, Billy dropped off
 drugs and picked up money, and the two proceeded to Nichols’ father’s house. Both
 Nichols and Jennings testified that Billy did not provide services to Jennings in
 exchange for Jennings’ checks.

17 Pamela testified that Billy used Jennings’ checks to persuade his business
 18 partner that he was in financial trouble, forcing him to borrow money from Jennings
 19 when, in fact, Billy concealed earnings from his business partner because Billy
 disapproved of his business partner’s financial dealings.

20 In November 2002, Nichols contacted officers with the Clark-Skamania Drug
 21 Task Force (DTF). Nichols agreed to participate in controlled methamphetamine
 buys from Billy in exchange for her release from jail. She performed controlled buys
 22 from Billy on December 18 and 19, 2002. On December 18, 2002, DTF officers met
 with Nichols, strip searched her and searched her vehicle to ensure she did not have
 23 any contraband in her possession prior to the buy, provided her with money to
 purchase methamphetamine, and followed her to Billy’s home. DTF officers then
 24 closely observed Billy’s home during Nichols’ stay.

25 Nichols entered Billy’s home, gave him the money, and used
 26 methamphetamine with Jordan, who was also present at the house. Billy returned
 27 with methamphetamine to the room where Nichols and Jordan were, the three sat for
 a while, then Nichols left in her car. DTF officers followed Nichols to a location

1 where they again searched her person and vehicle. Nichols gave the officers an
 2 amount of suspected methamphetamine consistent with the amount of money
 3 provided to her prior to the buy. [court's footnote 6. The powder was later tested and
 found to contain methamphetamine.]

4 The following day, Nichols conducted a second controlled buy at Billy's
 5 home. Nichols called Billy who told her to come over if she wished to purchase
 6 methamphetamine. Nichols met with DTF officers, who again searched both her
 7 person and vehicle before she drove to Billy's home. DTF officers again followed
 8 Nichols to Billy's home, observed her enter the home, observed her exit the home a
 9 short time later, and followed her to a pre-arranged location. Again, Nichols was
 under DTF surveillance during the entire process. Nichols gave the DTF officers the
 methamphetamine she had purchased. While Nichols testified that she arranged the
 purchase with Billy over the telephone, Jordan actually handed her the drugs in
 Billy's garage.

10 Coincidentally, on December 23, 2002, Vancouver police officer Paul Fisk
 11 stopped Billy because the splash guards/mud flaps on Billy's truck were inadequate
 12 to prevent spraying debris from the truck's oversized knobby tires. Officer Fisk
 obtained Billy's driver's license and asked him to exit the vehicle so that Officer
 Fisk could explain the nature of the infraction. Officer Fisk noticed that Billy's
 passenger, Jordan, was not wearing his seatbelt. Jordan verbally identified himself
 after Officer Fisk asked for identification. When Officer Fisk entered Jordan's
 information in his computer, he learned that Jordan was in violation of his probation,
 called for a cover officer, and arrested Jordan. Officer Fisk then explained that he
 was going to search Billy's vehicle incident to Jordan's arrest. Officer Fisk searched
 the vehicle and discovered a large zip-lock bag containing \$2,270 and three smaller
 baggies, each containing crystalline powder. [court's footnote 7. One baggie
 contained 21 grams of methamphetamine; one baggie contained 7/10 of a gram of
 methamphetamine; and one baggie contained crystalline powder that tested negative
 for methamphetamine.] Officer Fisk also found two glass pipes containing
 methamphetamine residue, \$671 cash on Billy's person, and white powder strewn
 across the passenger compartment of the truck. [court's footnote 8. Vancouver police
 did not attempt to gather or test the powder strewn in the passenger compartment of
 the truck. In addition, Department of Corrections officer Jeff Frice conducted a
 search of Billy's truck that produced results largely duplicative of those reached by
 Officer Fisk's search.]

23 Earlier in the day on December 23, 2002, Terry Horton, an acquaintance of
 24 Billy, was at Nichols' house to help a friend work on his truck. Nichols was selling a
 car and Billy came over to test drive it. While he test drove the car, Horton testified
 25 that Nichols went into Billy's pickup and began "digging around" behind the seat on
 the passenger side. 7 RP at 732. She got out of the truck with one of Billy's credit
 26 cards and told Horton that "[t]he bastard owes me money." 7 RP at 733.

27 DTF officers executed a search warrant at Billy's home on July 9, 2003.

Officers discovered a “scrape bag” [court’s footnote 9. The term “scrape bag” is used to describe a bag containing a small amount of methamphetamine. 5-B RP at 437] of methamphetamine in the pocket of a jacket hanging in Billy’s bedroom closet. 5-B RP at 437. DTF officer Charles Christensen testified that he did not speak with Billy during the search and that he did not know if the jacket was Billy’s. Pamela later testified, however, that the jacket was not Billy’s and that it probably belonged to her brother or to one of Billy’s friends.

The State filed a fourth amended information on October 7, 2004, charging Billy with (1) one count of possession of a controlled substance with intent to deliver-methamphetamine (former RCW 69.50.401(a)(1)(ii) (1998)); RCW 9A.08.020(3))(December 23, 2002); (2) two counts of unlawful delivery of a controlled substance (former RCW 69.50.401(a))) (December 18 and 19, 2002), with school zone enhancements for delivering methamphetamine within 1,000 feet of the perimeter of school grounds; (3) six counts of money laundering (RCW 9A.83.020) (check exchanges with Jennings); and (4) one count of unlawful possession of a controlled substance (former RCW 69.50.401(d) (1998)) (July 9, 2003).

The trial court denied Billy’s motion to sever the money laundering counts from the remainder of the State’s charges. [court’s footnote 10. Before trial, the trial court also denied (1) Billy’s motion to suppress evidence gathered on December 23, 2002; (2) Billy’s Knapstad motion, *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), regarding the State’s second delivery charge (the December 19, 2002 controlled buy); and (3) Billy’s motion to find Washington’s Special Inquiry Judge Act void for vagueness. Billy does not, however, assign error to the trial court’s rulings on these motions.] The jury found Billy guilty of possession of a controlled substance with intent to deliver-methamphetamine, guilty on both counts of unlawful delivery of a controlled substance, and guilty on one count of money laundering. The jury could not reach a verdict on the remaining five money laundering counts. [court’s footnote 11. The trial court dismissed the remaining five counts of money laundering at sentencing.] By special verdict, the jury also found that both deliveries took place within 1,000 feet of a school bus stop. Finally, the jury found Billy not guilty of unlawful possession of a controlled substance.

The trial court sentenced Billy to 111 months confinement, which included two school bus stop enhancements of 24 months running consecutively to each other and to the underlying sentence. . . .

(Dkt. # 20, Exh. 2, pp. 2-7).

II. CLAIMS FOR RELIEF

Mr. Fowler raises the following grounds for relief in his federal habeas petition:

- 1) The petitioner’s Fourth, Sixth, and Fourteenth Amendments to the United States Constitution were violated by the Police Officer’s [sic] in the illegal search of the

1 petitioner's vehicle, and the Trail [sic] Court abused it's Discretion by denying the
2 petitioner's Motion to Dismiss evidence which was obtained by an illegal search,
and Discovery violations by the State.

- 3 2) The petitioner's right to a fair trial was denied under the United States Constitution,
4 Fourteenth Amendment when the Trail [sic] Court (1) failed to grant a Motion for
5 Severance of Counts, (2) when it allowed the State to present evidence of similar bad
acts.
- 6 3) The petitioner's right to Due Process guaranteed by the Fourteenth Amendment to
7 the United States Constitution was violated when the State failed to provide
Discovery of Special Inquiry Subpoena's [sic], and an improper use of Special
8 Inquiry Process.
- 9 4) The petitioner's right to a fair trial under the Fourteenth Amendment to the United
10 States Constitution was violated by the cumulative error's [sic] in this case.

11 (Dkt. # 2, p. 1).

12 Respondent concedes that all Petitioner's claims have been exhausted. (Dkt. 19, p. 7).

13 **III. EVIDENTIARY HEARING**

14 The decision to hold a hearing is committed to the court's discretion. *Williams v. Woodford*,
15 306 F.3d 665, 688 (9th Cir. 2002). The petitioner bears the burden of showing the need for a
16 hearing. *Pulley v. Harris*, 692 F.2d 1189, 1197 (9th Cir. 1982), rev'd on other grounds, 465 U.S. 37
17 (1984); *Baja v. Ducharme*, 187 F.3d 1075 (9th.Cir. 1999). A hearing is not required if the claim
18 presents a purely legal question, or if the claim may be resolved by reference to the state court
19 record. *Campbell v. Wood*, 18 F.2d 662, 679 (9th Cir.) (en banc), cert. denied, 114 S. Ct. 2125
20 (1994).

22 The undersigned concludes that there are no relevant factual disputes to resolve in order to
23 render its decision in this case and accordingly, an evidentiary hearing need not be conducted.
24

25 **IV. STANDARD OF REVIEW**

26 This Court's review of the merits of Mr. Fowler's claims is governed by 28 U.S.C. §
27 2254(d)(1). Under that standard, the Court cannot grant a writ of habeas corpus unless a petitioner
28

1 demonstrates that he is in custody in violation of federal law and that the highest state court
2 decision rejecting his ground was either “contrary to, or involved an unreasonable application of,
3 clearly established Federal law, as determined by the Supreme Court of the United States.” 28
4 U.S.C. § 2254(c) and (d)(1). The Supreme Court holdings at the time of the state court decision
5 will provide the “definitive source of clearly established federal law.” *Van Tran v. Lindsey*, 212
6 F.3d 1143, 1154 (9th Cir. 2000), *overruled in part on other grounds by Lockyer v. Andrade*, 538
7 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). A determination of a factual issue by a state
8 court shall be presumed correct, and the applicant has the burden of rebutting the presumption of
9 correctness by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

11 A state-court decision is contrary to clearly established precedent if it “applies a rule that
12 contradicts the governing law set forth in” a Supreme Court decision, or “confronts a set of facts
13 that are materially indistinguishable” from such a decision and nevertheless arrives at a different
14 result. *Early v. Packer*, 537 U.S. 3 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06)
15 (2000)). “A state court’s interpretation of state law, including one announced on direct appeal of
16 the challenged conviction, binds a federal court sitting in habeas corpus.” *Bradshaw v. Richey*, 546
17 U.S. 74, 76 (2005). Therefore, a federal court may not overturn a conviction simply because the
18 state court misinterprets state law. *See id.* at 605; *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

21 The court “is limited to deciding whether a conviction violated the Constitution, laws, or
22 treaties of the United States.” *Id.* at 68; *see also Smith v. Phillips*, 455 U.S. 209, 221 (1982)
23 (“Federal courts hold no supervisory authority over state judicial proceedings and may intervene
24 only to correct wrongs of constitutional dimension.”). In addition, for federal habeas corpus relief
25 to be granted, the constitutional error must have had a “substantial and injurious effect or influence
26 in determining the jury’s verdict.” *Brech v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation
27

1 || omitted).

V. DISCUSSION

A. First Claim - Suppression of Evidence

5 Mr. Fowler claims that the state court erred when it denied his motion to dismiss evidence
6 seized during the search of his vehicle. (Dkt. # 1, p. 1; Dkt. # 2, pp. 11-18). Mr. Fowler claims,
7 *inter alia*, that the search exceeded the scope of the stop, that he was never read his *Miranda*¹
8 warnings, and he was detained for over 45 minutes for a stop that was later found to be unlawful.

9 | *Id.*

In *Stone v. Powell*, 428 U.S. 465, 494, 96 S.Ct. 3037, 3052, 49 L.Ed.2d 1067 (1976), the Supreme Court held that “where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.” There is no dispute that Mr. Fowler was given, and took advantage of, every opportunity to present evidence, to cross examine witnesses, and argue the law at his trial and again on appeal. Mr. Fowler complains that the trial court did not enter findings of fact and conclusions of law to support its decision denying his motion to suppress (Dkt. # 2, p. 18) and that the trial judge abused his discretion in relying on a decision in another court. *Id.*, p. 19.

21 However the United States Supreme Court requires only the initial opportunity for a fair
22 hearing. *Id.* at 494. Such an opportunity for a fair hearing forecloses this court's inquiry, upon a
23 habeas corpus petition, into the trial court's subsequent course of action, *Mack v. Cupp*, 564 F.2d
24 898, 902 (9th Cir.1977); *Cody v. Solem*, 755 F.2d 1323 (8th Cir.1985); *Griffin v. Rose*, 546 F.Supp.
25 932, 935 (E.D.Tenn.1981), *aff'd*, 703 F.2d 561 (6th Cir.1982), including whether or not the trial

¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

1 court has made express findings of fact. *See Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 855,
 2 83 L.Ed.2d 841 (1985).

3 The trial transcript provides a complete record of the findings and rulings made by the trial
 4 court. (Dkt. # 35, pp. 3-56). The trial court's decision is found at pages 53-56. It would be
 5 reversible error to fail to accord a presumption of correctness to the trial court's fact finding
 6 underlying its determination of probable cause. *Sumner v. Mata*, 449 U.S. 539, 550-51, 101 S.Ct.
 7 764, 770-71, 66 L.Ed.2d 722 (1981).

8 Mr. Fowler also presented this claim before the Washington Court of Appeals for review.
 9 That court concluded that the search was valid:

10 Billy argues that his detention by Vancouver Police exceeded the scope of
 11 the December 23, 2002 traffic stop and, therefore, the subsequent search of his
 12 vehicle was invalid. Billy is incorrect.

13 Incident to a valid arrest, law enforcement may conduct a warrantless search
 14 of the arrestee's person and the passenger compartment of the vehicle that he
 15 occupied at the time of the arrest. *State v. Johnson*, 128 Wn.2d 431, 446-47, 909
 16 P.2d 293 (1996); *State v. Stroud*, 106 Wn.2d 144, 152, 720 P.2d 436 (1986).

17 Officer Fisk stopped Billy on December 23, 2002, because the mud
 18 flaps/splash guards on his truck's oversized tires were inadequate to prevent the
 19 truck's tires from spraying debris onto other vehicles behind the truck. Officer Fisk
 20 asked Billy for his driver's license and to step out of the vehicle so that he could
 21 explain the problem with the truck's tires. Officer Fisk also noticed that Billy's
 22 passenger was not wearing a seat belt. He asked for identification and Jordan
 23 verbally identified himself. Officer Fisk returned to his patrol car and ran a check on
 24 both Billy and Jordan. Officer Fisk determined that Jordan was in violation of his
 25 probation. Officer Fisk placed Jordan under arrest and searched the passenger
 26 compartment of Billy's vehicle incident to that arrest.

27 Officer Fisk's valid arrest of Jordan entitled the officer to search the
 28 passenger compartment of Billy's vehicle. The search was valid. [court's footnote
 20. Billy also argues that the search was invalid because he was not read his
Miranda warnings until after the search. The protections afforded in *Miranda* deal
 25 with admissions and evidence obtained from arrestees by law enforcement through
 26 custodial interrogation, not searches incident to arrest. *See generally Miranda v.*
Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)].

1 (Dkt. # 20, Exh. 2, pp. 18-19).

2 As Mr. Fowler had the opportunity and in fact, did litigate his Fourth Amendment claims in
3 the trial court and the state appellate court, this claim is not cognizable in this habeas corpus
4 proceeding and it is recommended that his first habeas claim be denied.
5

6 **B. Second Claim for Relief - Severance**

7 In his second habeas claim for relief, Mr. Fowler argues that the trial court erred when it
8 failed to sever the drug delivery charges from the money laundering charges and when it allowed
9 evidence of similar bad acts. (Dkt. # 2, pp. 25-31).

10 Respondent argues that no United States Supreme Court decision has ever expressly held
11 that improper joinder of charges alone violates the Constitution. However, the Ninth Circuit
12 recognizes that federal habeas is available for improper consolidation if the simultaneous trial
13 “actually rendered [the petitioner’s] state trial fundamentally unfair and hence, violative of due
14 process.” *Park v. California*, 202 F.3d 1146, 1149 (2000) (*citing Featherstone v. Estelle*, 948 F.2d
15 1497, 1503 (9th Cir. 1991)). Each count is considered separately to determine whether the trial on a
16 particular count was fundamentally unfair in light of that count’s joinder with one or more other
17 charges. *Featherstone*, 948 at 1503. The petitioner has the burden to prove unfairness rising to the
18 level of a due process concern. *See McKenzie v. McCormick*, 27 F.3d 1415, 1418 (9th Cir. 1994).

19
20 Mr. Fowler argues that evidence as to the six money laundering charges, which spanned a
21 period of three years, was weak, based on unreliable testimony, and should not have been admitted
22 as to the drug counts. (Dkt. # 2, pp. 25-26). He also argues that there was an enhanced possibility
23 of prejudice from allowing the jury to hear the money laundering evidence as part of the drug case
24 even though the jury acquitted Mr. Fowler on one of the possession charges (Count 10) and was
25 able to decide only one of the six money laundering counts. (Dkt. # 2, p. 26).

1 A violation of state law standing alone is not cognizable in federal court on habeas. *Estelle*
 2 *v. McGuire*, 502 U.S. 62, 67 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780) (1990);
 3 *Featherstone*, 948 F.2d at 1503. Mr. Fowler has the burden of showing, in federal constitutional
 4 terms, that his state trial was fundamentally unfair. *Park*, 202 F.3d at 1149. The failure of the jury
 5 to convict on all counts is “the best evidence of the jury’s ability to compartmentalize the
 6 evidence.” *United States v. Baker*, 10 F.3d 1374, 1387 (9th Cir. 1993) (quoting *United States v.*
 7 *Unruh*, 855 F.2d 1993) (9th Cir. 1987).

9 In this case, the jury could not reach a verdict on five counts and found Mr. Fowler not
 10 guilty of the unlawful possession of a controlled substance charge. (Dkt. # 36, pp. 889-892). This
 11 verdict suggests that the jury did not cumulate evidence or base its decisions on admission of Mr.
 12 Fowler’s drug-related activity. Rather, the verdict suggests that the jury considered each count
 13 separately and properly compartmentalized the evidence on each count. Mr. Fowler has failed to
 14 demonstrate that his state trial was fundamentally unfair.

16 In affirming Mr. Fowler’s conviction, the Washington Court of Appeals discussed Mr.
 17 Fowler’s argument that the trial court abused its discretion in denying his motion to sever:

18 Billy argues that the trial court should have granted his motion to sever the
 19 money laundering charges. He argues that evidence of drug-related activity with
 20 Nichols and Jordan before the December controlled buys and the December 23, 2002
 21 traffic stop, admitted to support the money laundering charges, improperly
 influenced the jury.

22 CrR 4.3(a) permits joinder of two or more offenses that (1) are of similar
 23 character even if the offenses are not part of a single scheme or plan; or (2) are based
 24 on a series of acts connected together or constituting parts of a single scheme or
 25 plan. CrR 4.3(a)(1), (2); *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990).
 26 Offenses properly joined under CrR 4.3(a) may be severed, however, if the court
 27 determines that severance will promote a fair determination of the defendant’s guilt
 or innocence of each offense. CrR 4.4(b); *Bythrow*, 114 Wn.2d at 717; *State v.*
Cotten, 75 Wn. App. 669, 686, 879 P.2d 971 (1994). A defendant seeking severance
 has the burden of demonstrating that the joinder of offenses would be so manifestly
 prejudicial as to outweigh the concern for judicial economy. *Bythrow*, 114 Wn.2d at

1 718; *Cotten*, 75 Wn. App. at 686.

2 The trial court's refusal to sever counts is reversible only upon a showing that
 3 the court's decision constituted a manifest abuse of discretion. *Bythrow*, 114 Wn.2d
 4 at 717. Further, if joinder was improper but offenses were nonetheless consolidated
 5 in one trial, we affirm convictions if the error was harmless. *State v. Bryant*, 89 Wn.
 6 App. 857, 864, 950 P.2d 1004 (1998).

7 Joinder of offenses may prejudice a defendant in that (1) he may become
 8 confounded in presenting separate defenses; (2) the jury may use the evidence of one
 9 crime charged to infer guilt on another crime charged; or (3) the jury may cumulate
 10 evidence of the various charged crimes and find guilt when, if considered separately,
 11 it would not so find. *Bythrow*, 114 Wn.2d at 718. But factors that tend to mitigate
 12 prejudice from joinder include: (1) the strength of the State's evidence on each of the
 13 counts; (2) the clarity of the defenses on each of the counts; (3) the propriety of the
 14 trial court's instruction to the jury regarding the consideration of each count
 15 separately; and (4) the admissibility of evidence of the other crime. *Cotten*, 75 Wn.
 16 App. at 687.

17 Here, the State's theory was that Billy was a methamphetamine dealer who
 18 disguised his earnings from drug sales as loans from Jennings, and that these acts
 19 constituted part of a single scheme based on a series of acts constituting separate
 20 parts of a single scheme or plan. CrR 4.3(a) permits joinder of two or more offenses
 21 that are based on a series of acts connected together or constituting parts of a single
 22 scheme or plan. CrR 4.3(a)(2); *Bythrow*, 114 Wn.2d at 717-18. We construe this rule
 23 expansively to conserve judicial and prosecution resources. *Bryant*, 89 Wn. App. at
 24 864.

25 Turning to the question of whether Billy was prejudiced by joinder of the
 26 money laundering and drug charges, the facts of this case are analogous to those in
 27 *Cotten* where the court discredited the defendant's assertion that the presentation of
 28 one defense undercut a second defense by explaining that the defendant's defenses to
 both charges at issue were the same and, thus, could not affect his ability to make his
 defenses clear to the jury. 75 Wn. App. at 687. Billy's defense to the money
 laundering and drug charges is effectively the same. His drug charges defense asserts
 that he had no involvement with drugs he did not possess, sell, or intend to sell
 methamphetamine. Similarly, Billy's defense to the money laundering charges
 contend that his cash-for-check exchanges with Jennings had no relationship to
 earnings from drug sales.

29 The joinder of offenses did not prevent a clear defense on both charges
 30 because the advancement of one defense does not undercut the other defense. Both
 31 defenses rest on denial of involvement with drugs.

32 Furthermore, the trial court instructed the jury to decide each count
 33 separately and that the jury's verdict on one count should not control its verdict on

any other count. These jury instructions have been held sufficient to protect against prejudice that may result from joinder of offenses. *Cotten*, 75 Wn. App. at 688. And we presume that a jury follows the trial court's instructions. *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). Moreover, Billy neither objected to the proposed jury instructions nor requested any limiting instruction to further avoid unfair prejudice that may have been caused by cumulative consideration of evidence by the jury. Failure to request a limiting instruction waives any error or unfair prejudice that may have been cured by a limiting instruction. *State v. Ramirez*, 62 Wn. App. 301, 305-06, 814 P.2d 227 (1991); *State v. Barber*, 38 Wn. App. 758, 771, 689 P.2d 1099 (1984).

While it may be questionable whether testimony about Billy's drug-related activity with Nichols and Jordan would have been admissible in a separate trial on only the drug charges, [court's footnote 12. Billy concedes that the evidence was probably admissible in the money laundering case to establish that the cash he exchanged for checks came from illegal activities] severance is not automatically required when the evidence on one charge is not admissible in a separate trial on other charges. *Bythrow*, 114 Wn.2d at 720. When the State's evidence is strong on each count despite the lack of cross-admissibility, there is no necessity for the jury to base its finding of guilt on any one count on the strength of the evidence of another count. [footnote 13 omitted] *Bythrow*, 114 Wn.2d at 721-22.

Here, the evidence was strong on the December 18 and 19 controlled buys by Nichols and the December 23 traffic stop where drugs and money were recovered from Billy's truck. And the jury found Billy not guilty of the unlawful possession of a controlled substance charge. This verdict suggests that the jury did not cumulate evidence or base its decisions on admission of his drug-related activity with Nichols and Jordan before December 18. Rather, the verdict suggests that the jury considered each count separately and properly compartmentalized the evidence on each count.

The trial court did not abuse its discretion in denying Billy's motion to sever the money laundering charges from the drug charges.

(Dkt. # 20, Exh. 2, pp. 8-11).

The conclusion reached by the Washington Court of Appeals was not unreasonable. To the contrary, the state appellate court considered the strength of the state's evidence on each count, the clarity of defenses as to each court, the court's instructions to the jury and admissibility of evidence of other charges if not joined for trial.

Finally, as to Mr. Fowler's argument that the failure to sever resulted in the improper admission of evidence of similar bad acts, the undersigned agrees that this allegation does not

1 demonstrate a constitutional violation. A federal habeas court cannot review questions of state
 2 evidence law. *See Henry v. Kernan*, 177 F.3d 1152, 1159 (9th Cir. 1999). It is well settled that a
 3 state court's evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it
 4 renders the state proceedings so fundamentally unfair as to violate due process. *See id.* (citing *Hill*
 5 *v. United States*, 368 U.S. 424, 428 (1962); and *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir.
 6 1993)).

8 As noted above, the state court reasonably denied this claim because Mr. Fowler did not
 9 show admission of the bad acts evidence rendered the trial unfair and caused actual prejudice. (Dkt.
 10 # 20, Exh. 2, p. 18). This Court is not aware of any United States Supreme Court case that would,
 11 under the same factual scenario, render a result opposite to that reached by the Washington Court of
 12 Appeals.

14 For these reasons, the undersigned recommends that Mr. Fowler's second claim for habeas
 15 relief be denied.²

16 **C. Third Claim for Relief - Violations of Discovery and Special Inquiry Subpoenas**

17 Mr. Fowler's third claim for relief is based on his claim that his due process rights were

19 ²Mr. Fowler also states as a general proposition that "severance of joined offenses may be
 20 necessary to avoid prejudice when a defendant wishes to testify regarding some counts and invoke
 21 the Fifth Amendment (sic) regarding others," however he does not contend that the joinder of
 22 counts in this case unduly affected his choice to testify. (Dkt. # 2, p. 27). Mr. Fowler is correct that
 23 he has a due process right to testify in his own defense, but that right does not guarantee that he may
 24 testify only to information favorable to his defense. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).
 25 Joinder of counts may unduly affect a defendant's choice whether to testify. *See, e.g., United States*
 26 *v. Balzano*, 916 F.2d 1273, 1283 (7th Cir. 1990). To obtain severance because of this prejudicial
 27 effect, a defendant "must show that he has important testimony to give on some counts and a strong
 need to refrain from testifying on those he wants severed." *See United States v. Nolan*, 700 F.2d
 479, 483 (9th Cir. 1983). Thus, in support of a motion for severance, a defendant must specifically
 identify the testimony he would offer in his defense so that the trial court can determine if that
 testimony is important enough to justify severance. *Comer v. Schiro*, 463 F.3d 934, 959 (9th Cir.
 2006). There is nothing in the record to indicate that Mr. Fowler moved for severance on his right
 to testify in his own defense.

1 violated by the State's refusal to provide Motion Data Terminal transmission records related to his
 2 traffic stop and copies of the Special Inquiry Subpoenas used in its pre-trial investigation for the
 3 production of records relating to his bank accounts. (Dkt. # 2, pp. 32-42). Mr. Fowler claims that
 4 the evidence is exculpatory. *Id.*, p. 36.
 5

6 The Washington Court of Appeals held that Mr. Fowler was not entitled to relief on the
 7 alleged discovery violations because he had waived the claim:

8 Billy contends that he made several unanswered requests for (1) the Mobile
 9 Data Terminal (MDT) transmissions of Officer Fisk's traffic stop; and (2) copies of
 the special inquiry subpoenas the State used to investigate Billy.

10 1. Mobile Data Transmissions

11 Billy cites Clerk's Papers at 139 and Report of Proceedings at 108-125 in
 12 support of his argument that he made numerous requests for the MDT transmissions.
 13 Clerk's Papers at 139, however, does not mention MDT transmissions. But two of
 14 Billy's attorneys filed omnibus applications requesting production of the MDT
 transmissions. [court's footnote 21. Billy, in a pro se omnibus application to the trial
 court, also requested the MDT transmissions. It does not appear that the State or the
 15 trial court signed this application.] In response, the State agreed to provide them. But
 no subsequent mention was made of the MDT transmissions. Nor were they
 16 discussed during Billy's (1) suppression hearing; (2) fourth attorney's omnibus
 17 application; (3) motion to sever; (4) Knapstad motion; (5) motion asking the trial
 18 court to rule that Washington's Special Inquiry Judge Act, chapter 10.29 RCW, is
 void for vagueness; or (6) motion requesting copies of the special inquiry subpoenas.

19 Billy asserts that "the records were essential to the defense in order to prove
 20 that the traffic stop was pretextual and contingent upon the earlier contact with a
 21 police informant whom [sic] planted the evidence in the defendant's vehicle. [court's
 22 footnote 22. Billy is presumably referring to the December 23, 2002 traffic stop
 leading to the State's possession with intent to deliver charge and Horton's
 23 testimony that Nichols was "digging around" (7 RP at 732) the back of Billy's truck
 hours before the traffic stop.] SAG at 7.

24 Discovery violations should be raised at trial so the trial court can compel
 25 discovery if necessary. *State v. Boot*, 40 Wn. App. 215, 220, 697 P.2d 1034 (1985).
 26 As the language of CrR 4.7(h)(7)(i) indicates, a party should raise noncompliance
 27 with the discovery rules "during the course of the proceedings." The failure to raise
 the issue below waives the right to assign error to an alleged discovery violation on
 appeal. See also *State v. Wilson*, 56 Wn. App. 63, 66, 782 P.2d 224 (1989); *Boot*, 40
 Wn. App. at 220 (claim of error based on a discovery violation waived by failing to

1 make a timely objection).

2 Further, while the State must disclose all material evidence favorable to the
 3 defendant, the evidence must be material before a defendant may claim prejudice
 4 from the State's failure to disclose it. CrR 4.7(e)(1); see *Banks v. Dretke*, 540 U.S.
 5 668, 691, 124 S. Ct. 1256, 157 L.Ed.2d 1166 (2004); see also *Brady v. Maryland*,
 6 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). The materiality standard
 7 requires that there is a reasonable probability of a different result had the evidence
 8 been discovered. *Banks*, 540 U.S. at 698-99. Here, the materiality of the MDT
 9 transmissions to Billy's defense is purely speculative.

10 Finally, the MDT transmissions are not in the record. Thus, Billy's assertions
 11 regarding their necessity to prove pretext require evidence outside the record. "If a
 12 defendant wishes to raise issues on appeal that require evidence or facts not in the
 13 existing trial record, the appropriate means of doing so is through a personal restraint
 14 petition, which may be filed concurrently with the direct appeal." *McFarland*, 127
 15 Wn.2d at 335. We do not consider matters outside the record. *McFarland*, 127
 16 Wn.2d at 335.

17 2. Special Inquiry Subpoenas

18 Billy also asserts that the State has never produced copies of the special
 19 inquiry subpoenas the trial court ordered produced on October 27, 2004.

20 On September 28, 2004, Billy moved for production of copies (and noted that
 21 he had at some time before requested copies) of the special inquiry subpoenas issued
 22 during the State's investigation. [court's footnote 23. Billy, in a pro se omnibus
 23 application to the trial court, also requested the special inquiry subpoenas. It does not
 24 appear that the State or the trial court signed this application. Further, Billy's
 25 attorney indicated on the record that at least one of Billy's previous attorneys had
 26 requested the subpoenas.] The State responded that it did not have authority to
 27 release copies of the subpoenas absent a court order. [court's footnote 24. The State
 28 further suggests in its brief that it did not have the subpoenas in its possession.] The
 29 State provided "copies of everything that [it had] gotten from [the Special Inquiry
 30 Judge]" and gave Billy copies of the two affidavits filed with the court in support of
 31 the issuing of the special inquiry subpoenas. 3 RP at 117. Billy does not disagree that
 32 the State had provided these records. The trial court agreed to issue an order
 33 compelling release of the copies of the subpoenas and informed Billy that they were
 34 on file at the Clark County Clerk's Office.

35 On October 27, 2004, nearly three weeks after the trial concluded, the trial
 36 court issued the order releasing copies of the subpoenas. Billy received two letters
 37 from the Clark County Clerk's Office, dated November 18, 2004, and March 17,
 38 2005, indicating that the office had yet to locate the subpoenas for numerous reasons,
 39 including lack of cooperation by the State. [court's footnote 25. These letters are not
 40 designated Clerk's Papers. They appear to have been only in Billy's possession. In

1 its brief, the State indicated that it decided to obtain and file certified copies of the
 2 subpoenas with the trial court and designate them as additional Clerk's Papers.
 3 Copies of the subpoenas were, in fact, filed on September 14, 2005.]

4 Billy asserts violation of the Fourteenth Amendment to the United States
 5 Constitution. A defendant may raise a constitutional violation for the first time on
 6 appeal, but the burden is on the defendant to show that it represents a "manifest
 7 error" and that it had practical and identifiable consequences on the trial. *State v..*
WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999). For purposes of
 8 reviewing an alleged constitutional error not raised at trial, if the record is
 9 insufficient to determine the merits of the constitutional claim, then the claimed error
 10 is not manifest and review not warranted. *WWJ Corp.*, 138 Wn.2d at 602.

11 Here, it is difficult to discern what prejudice may have resulted from the
 12 State's failure to produce copies of the subpoenas before trial. Billy has not asserted
 13 that the State limited his access to the evidence obtained during the special inquiry
 14 process. Furthermore, Billy did not raise the issue before the trial court, nor did he
 15 ask for a trial continuance so he could obtain them. The State also notes that Billy
 16 failed to raise the issue at his sentencing hearing and that he withdrew his motion for
 17 a new trial. We find that Billy failed to show a manifest error resulting in a complete
 18 miscarriage of justice.

19 C. Use of the Special Inquiry Process

20 Billy contends that the State used the special inquiry process to gather
 21 evidence to support charges already filed. In *State v. Manning*, 86 Wn.2d 272, 275,
 22 543 P.2d 632 (1975), our Supreme Court held that a special inquiry proceeding may
 23 not be used to discover or gather evidence against a defendant for crimes already
 24 charged.

25 Billy was charged with one count of possession with intent to deliver on
 26 December 26, 2002, a charge arising solely out of the traffic stop on December 23,
 27 2002. Billy contends that the State used the special inquiry process to gather
 28 evidence to support that charge. The State responds that the drug task force had been
 conducting a separate investigation of Billy's methamphetamine sales and that it
 used the special inquiry process to investigate the money laundering charges.

29 Billy's claim fails. There is no evidence that the State used the special
 30 inquiry process to gather evidence to support the possession with intent to deliver
 31 charge. On the other hand, the evidence does demonstrate that the State filed eight
 32 charges unrelated to the December 26, 2002 charge in August 2003, and that there
 33 was substantial evidence at trial on the other charges.

34 (Dkt. # 20, Exh. 2, pp. 19-23).

1 Habeas corpus relief does not lie for alleged violations of state discovery rules. *See, e.g.*,
2 *Lincoln v. Sunn*, 807 F.2d 805, 816 (9th Cir. 1987) (claim alleging violation of Hawaii's rules of
3 criminal procedure for failure to provide police detective's handwritten notes to cross-examine
4 witness deprived him of the opportunity to effective cross-examine the witness are not appropriate
5 in habeas proceeding). In this case, there is no explanation of the materiality of the MDT
6 transmissions to Mr. Fowler's defense. As noted by the Washington Court of Appeals, Mr. Fowler
7 failed to raise the issue of their production at the trial court during his suppression hearing and other
8 pre-trial discovery motions and thereby waived the right to assign error to any alleged discovery
9 violation on appeal. *Id.*, pp. 19-20. *See, e.g.*, *Reed v. Ross*, 468 U.S. 1, 11 (1984) ("A prisoner who
10 under state law has waived the right to appeal a constitutional claim may not obtain federal habeas
11 corpus relief on that issue without demonstrating cause for, and actual prejudice from, the default.)
12 Federal relief is unavailable to a habeas petitioner if he is procedurally barred from raising the
13 federal issue in a state habeas proceeding. *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497,
14 2507, 53 L.Ed.2d 594 (1977). The claim will be barred from reconsideration in federal court if the
15 state court judgment on collateral review is clearly and expressly grounded on a state procedural
16 rule. *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 1043, 1044 n. 10 (1989). We are bound by the
17 state court's interpretation of its own rules. *McSherry*, 880 F.2d at 1052 n. 2; *Allen v. Morris*, 845
18 F.2d 610, 614 (6th Cir.1988), *cert. denied*, 488 U.S. 1011, 109 S.Ct. 799, 102 L.Ed.2d 790 (1989).

22 With regard to Mr. Fowler's claim as to copies of the Special Inquiry Subpoenas, the court
23 must analyze the claim keeping in mind that due process requires that criminal prosecutions
24 "comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479,
25 485 (1984). The state must afford criminal defendants a "meaningful opportunity to present a
26 meaningful defense," *id.*, which in turn requires that the State must provide the accused with
27

1 exculpatory evidence. *Featherstone*, 948 F.2d at 1504. In this case, however, it is uncontested that
2 Mr. Fowler and his counsel had access to all of the evidence the State obtained from the subpoenas.
3 (Dkt. # 35, pp. 117-118). In his state court appeal and his petition before this Court, Mr. Fowler
4 fails to show any prejudice from not receiving copies of the subpoenas in question or that they are
5 material or relevant.
6

7 Under AEDPA, this court may grant relief on this claim only if the state court's decision was
8 "contrary to, or involved an unreasonable application of, clearly established federal law as
9 determined by the Supreme Court." 28 U.S.C. 254(d)(1). The state court decision denying Mr.
10 Fowler's claim that he was denied due process by the failure to provide him with the MDT
11 transmissions and the Special Inquiry Process subpoenas was not contrary to clearly established
12 federal law as determined by the United States Supreme Court. *See, Dows v. Wood*, 211 F.3d 480,
13 486 (9th Cir. 2000). Accordingly, the undersigned recommends that Plaintiff's third claim for
14 habeas relief be denied.
15

16 **D. Fourth Claim - Cumulative Error**

17 In his fourth claim for relief, Mr. Fowler alleges that the combination of errors, when
18 considered cumulatively, violate due process. (Dkt. # 2, p. 42). Mr. Fowler argues that a
19 cumulative error analysis is necessary because his right to a fair trial under the Fourteenth
20 Amendment was violated by the cumulative effect of the trial court errors in this case namely, those
21 errors mentioned in the three habeas claims discussed above. *Id.*
22

23 Respondent argues that the Supreme Court has never recognized cumulative error as a basis
24 for habeas corpus relief, that Mr. Fowler has not shown the existence of a constitutional error in any
25 of his claims and therefore, is not entitled to relief under a cumulative error analysis, and the state
26 court decision denying his claim was not contrary to an unreasonable application of clearly
27

1 established federal law.

2 The Supreme Court has established that the combined effect of multiple trial court errors
 3 violates due process where it renders the resulting criminal trial fundamentally unfair. *Chambers v.*
 4 *Mississippi*, 410 U.S. 284, 298, 302-03 (1973) (combined effect of individual errors “denied
 5 [Chambers] a trial in accord with traditional and fundamental standards of due process” and
 6 “deprived Chambers of a fair trial.”); *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007). However,
 7 Mr. Fowler has not demonstrated the existence of a constitutional error in any of his previous
 8 claims sufficient to undermine confidence in the verdict, thereby negating the necessity for a
 9 cumulative error analysis. *See, e.g., Thompson v. Calderon*, 109 F.3d 1358, 1369 (9th Cir. 1996)
 10 (finding no prejudice from the errors taken separately, we also find no cumulative prejudice. *See*
 11 *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir.1978) (en banc) (“prejudice may result from the
 12 cumulative impact of multiple deficiencies”), *cert. denied*, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d
 13 793 (1979)).

14 The Washington Court of Appeals denied Mr. Fowler’s cumulative error claim as follows:

15 Billy argues that there were numerous errors amounting to cumulative error
 16 entitling him to a new trial.

17 The cumulative error doctrine applies when several errors occurred at the
 18 trial court level, none alone warranting reversal, but the combined errors effectively
 19 denied the defendant a fair trial. *State v. Hodges*, 1189 Wn. App. 668, 673-74, 77
 20 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004). The defendant bears the
 21 burden of proving cumulative error of sufficient magnitude that a retrial is necessary.
 22 *See In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964
 23 (1994). Here, the trial court did not abuse its discretion by denying Billy’s motion to
 24 sever. Second, while testimony regarding Billy’s prior bad acts may have lacked
 25 admissibility in a trial limited solely to the drug charges, the strength of the State’s
 26 evidence supporting the drug charges negated any prejudice that might have
 27 otherwise resulted. Finally, Billy’s counsel repeatedly objected to the trial court’s
 28 admission of Billy’s drug-related activities with Nichols and Jordan before
 December 18, 2002, and unsuccessfully moved to sever the money laundering
 charges from the drug charges.

1 || (Dkt. # 20, Exh. 2, pp. 17-18).

The state court decision denying Mr. Fowler's claim was not contrary to clearly established federal law as determined by the United States Supreme Court. *See, Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000). Accordingly, the undersigned recommends that Plaintiff's fourth claim for habeas relief be denied.

VI. CONCLUSION

8 Based on the foregoing discussion, Mr. Fowler's habeas petition should be denied, and this
9 action dismissed. A proposed Order of Dismissal accompanies this Report and Recommendation.
10 No evidentiary hearing is required as the record conclusively shows that Mr. Fowler is not entitled
11 to relief.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure,
the parties shall have ten (10) days from service of this Report to file written objections. *See also*
Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes
of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule
72(b), the clerk is directed to set the matter for consideration on **June 20, 2008** as noted in the
caption.

DATED this 29th day of May, 2008.

Ken Lstrom

**Karen L. Strombom
United States Magistrate Judge**